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In the Supreme Court of the United States

WILLIAM OVERTON, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

MICHELLE BAZZETTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments.

2. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests.

3. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

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INTEREST OF THE UNITED STATES

This case concerns whether an inmate has a constitutional right to visitation and, if so, the limits prison officials can place on that right. The United States has a substantial interest in the resolution of that issue. The Federal Bureau of Prisons (BOP), which currently supervises more than 164,000 federal inmates, has regulations that afford wardens substantial authority to restrict federal prisoners' ability to receive visits. See 28 C.F.R. 540.40-540.51. A decision recognizing a constitutional right to non-contact visits when contact visits are deemed inappropriate could also have a significant fiscal impact on the United States and require modification of federal penal institutions, some of which do not have facilities for non-contact visits.

STATEMENT

1. Early American criminal codes (like their English antecedents) often provided for punishments other than incarceration, relying on the infliction of pain (*e.g.*, whippings), shaming techniques (*e.g.*, the stocks or public cages), banishment, and capital punishment. See D. Rothman, *The Discovery of the Asylum* 48 (1971); N. Rafter & D. Stanley,

Prisons in America 2-3 (1999); R. Pound, *Criminal Justice in America* 103, 111 (1930) (punishment in the ages of Coke and Blackstone); L. Friedman, *Crime and Punishment in American History* 36-41, 48 (1993). Early in the Nation's history, however, incarceration became the principal means of punishment. In 1790, for example, the City of Philadelphia renovated its Walnut Street Jail to include individual cells in which serious offenders (it was hoped) might "reflect on their sins, discover their inner light, repent, and thus emerge reformed." Rafter & Stanley, *supra*, at 3. By the early 19th century, many of the original States had constructed "penitentiaries" based on the same principle, and by the mid-19th century, incarceration in such institutions was the primary means of criminal punishment. Rothman, *supra*, at 80-81.

Many early penitentiaries were designed to separate prisoners from the outside world. Accordingly, visitation was often limited severely or precluded entirely. The idea was to "cut their inmates off" from outside influences, "isolating them under circumstances in which they could be taught good habits * * * and * * * reformed." Rafter & Stanley, *supra*, at 5. Physical separation from those outside the facility thus was an integral part of the punishment and the rehabilitation effort, an inherent incident of inmate status. See Rothman, *supra*, at 94.

Although modern penal institutions still physically separate inmates from the outside world, they generally permit inmates to receive limited visits as a privilege and as an aid to rehabilitation. The Federal Bureau of Prisons (BOP), for example, encourages family visits because they can promote positive relationships that improve prisoner morale, strengthen family ties and parental responsibility, and facilitate the transition to freedom. 28 C.F.R. 540.40. Cf. *Procunier* v. *Martinez*, 416 U.S. 396, 412 & n.13 (1974) (noting BOP's view that community contact can be "a valuable therapeutic tool in the overall correction process"). At the same time, however, such visits create dangers—to guards, to visitors, and to prison order and discipline. Visits can be used to smuggle contraband, such as drugs. Visits can result in disorderly

behavior by prisoners. And visits introduce untrained civilians into an institution occupied primarily by convicted criminals whose behavior is often difficult to control. For that reason, BOP regulations afford wardens substantial discretion to restrict social visits. Wardens may limit visits for the entire institution, 28 C.F.R. 540.40; restrict the number of persons who may visit an inmate at one time, 28 C.F.R. 540.43; and prohibit certain individuals from visiting an institution, 28 C.F.R. 540.44-540.51. In addition, BOP officials may restrict visits for inmates who infringe visiting rules or threaten the orderliness or security of the visiting room, 28 C.F.R. 540.50(c) and 540.52, or are found guilty of a prohibited act in a prison disciplinary proceeding, 28 C.F.R. 541.12, Table 4, 2(g); BOP Program Statement 5270.07, *Inmate Discipline and Special Housing Units*, Ch. 4, at 20 (2002).

In the federal system, most visits are "contact visits." During those visits (which often take place in a large, common visiting room), prisoners and their visitors are permitted some physical contact. There are, however, circumstances in which physical contact is proscribed. Such "non-contact" visits typically take place through a s[illegible]ial barrier between the visitor and the prisoner, and close supervision is often required. The BOP has non-contact visiting facilities only in a limited number of federal institutions, primarily pre-trial detention centers and high security institutions.

2. This case concerns a constitutional challenge to the State of Michigan's regulations limiting inmates' privilege to receive social visits. As a general matter, Michigan allows inmates to receive social visits from any member of their immediate family, plus ten other individuals designated by the inmate. Mich. Admin. Code R. 791.6609(2), (9). Because of past difficulties, however, the rules include a number of restrictions on visitation by minors. For example, prisoners cannot receive visits from minors other than the prisoner's child, stepchild, or grandchild, *id.* R. 791.6609(2)(b), and all minors must be accompanied by an adult family member or

legal guardian, *id.* R. 791.6609(5).[1] Visits by a prisoner's minor child are also barred if the prisoner's parental rights have been terminated. *Id.* R. 791.6609(6)(a).

In addition, the rules preclude visits from former prisoners, Mich. Admin. Code R. 791.6609(7), except clergy and lawyers, *id.* R. 791.6609(8), and members of the prisoner's immediate family with the warden's prior approval, *id.* R. 791.6609(7)(a) and (b). Finally, Michigan will withdraw visiting privileges for at least two years for any prisoner found guilty of two or more major misconducts in the prison discipline system for substance abuse. *Id.* R. 791.6609(11)(d). That restriction cannot be imposed until after the inmate has an opportunity to dispute the major misconduct charge at a hearing under Mich. Admin. Code R. 791.3315. See Mich. Admin. Code R. 791.5501; Mich. Dep't of Corrections Policy Directive 03.03.15, § II. A prisoner who loses visiting privileges can apply for their reinstatement after two years. Mich. Admin. Code R. 791.6607(12).

In 1995, respondents (representatives of a class of prisoners in Michigan state prisons and their prospective visitors) filed this suit under 42 U.S.C. 1983 to challenge those limits. Respondents contend that the limits deprive them of a right to visits established by the First and Fourteenth Amendments of the United States Constitution and subject them to cruel and unusual punishment in violation of the Eighth Amendment. Based on petitioners' representation that the regulations applied only to contact visits, the district court granted summary judgment in favor of petitioners, Pet. App. 159a, and the Sixth Circuit affirmed, *id.* at 126a.

On remand, respondents argued that petitioners applied the regulations to non-contact visits as well, and challenged the regulations as applied to such visits. After a bench trial, the district court ruled in favor of respondents, holding that prisoners have a right to receive visits under the First and

[1] The Michigan legislature amended this rule in May 2001 to permit visits by minor siblings. See Mich. Comp. Laws Ann. § 791.268a (West Supp. 2002); Pet. 8 & n.5.

Fourteenth Amendments. Pet. App. 23a. The court also held that Michigan's restrictions violated the Constitution as applied to non-contact visits because they were not supported by a valid penological objective as required by *Turner* v. *Safley*, 482 U.S. 78 (1987).

3. The Sixth Circuit affirmed. The court first held "that prisoners do retain a limited right to * * * non-contact visits with intimate associates * * * even while incarcerated." Pet. App. 9a. The court then held that Michigan's restrictions on such visits were not reasonably related to a legitimate penological objective. *Id.* at 12a-20a.

Invalidating Michigan's prohibition on visits by minors other than the convict's children or grandchildren, Mich. Admin. Code R. 791.6609(2), the court held that the prohibition could not be justified by a desire to relieve overcrowding in visiting areas, since it was not calibrated to reduce visits to a particular number. Pet. App. 13a. The court also rejected Michigan's concern that the rule was necessary to prevent smuggling and protect visiting children from possible assault. *Ibid.* The court faulted Michigan for failing to offer "data or expert testimony to support these claims," and asserted that "non-contact visits" would "prevent both" potential abuses. *Ibid.* For largely the same reasons, the court invalidated Michigan's ban on visits by children with respect to whom a prisoner's parental rights have been terminated. Michigan's "general desire to reduce the number of visitors and protect children," the court held, is insufficient to "block visits from an inmate's child, when the inmate has voluntarily surrendered parental rights in the child's best interests." *Id.* at 15a.

The court also rejected Michigan's requirement that visiting children be accompanied by an immediate family member or legal guardian. Pet. App. 16a-17a. That policy, the court held, unduly interferes with family relationships, because many parents and legal guardians may find it difficult to accompany their children personally. *Id.* at 17a. Michigan's former policy of requiring children to be accompanied by an adult with "a valid power of attorney," the court held, was

sufficient to prevent unauthorized visits and ensure child safety. *Id.* at 16a. The court also rejected Michigan's ban on visits by former prisoners other than immediate family members. The State, the court held, should screen out potential trouble-makers individually. *Id.* at 15a-16a.

Finally, the court of appeals held that Michigan's regulation withdrawing visitation rights for prisoners found guilty of two major, in-prison substance abuse infractions violates the First and Eighth Amendments. Pet. App. 18a-22a. The court faulted the ban because, in the court's view, it had been imposed "capriciously and according to no reviewable standards." *Id.* at 19a. The court also held that, because petitioners presented "only anecdotal evidence to show that the permanent ban on visitors has deterred drug abuse in the prison population," the ban had no reasonable relationship to a legitimate penological interest. *Id.* at 20a. Prisoners, the court further stated, lack means other than visits for maintaining family and friendship ties. "[P]hone calls cannot substitute for seeing a loved one, nor does the liberty to send and receive letters mean much to functionally illiterate prisoners." *Ibid.* The court opined that prison officials "have at their disposal many other constitutional means of punishing prisoners for violating drug rules." *Ibid.*

Deeming the punitive visitation ban "an extremely harsh measure," the court of appeals also held that it violates the Eighth Amendment. Pet. App. 21a. The ban, the court stated, "depriv[es] an inmate of all visitors for a period stretching indefinitely," removes "the single most important factor in stabilizing a prisoner's mental health," "goes to the essence of what it means to be human," destroys family bonds, and goes far beyond what any other prison system imposes. *Ibid.*

SUMMARY OF ARGUMENT

The Federal Bureau of Prisons' policies generally encourage family visitation. 28 C.F.R. 540.40. BOP regulations recognize that appropriate social visits can promote positive relationships that improve prisoner morale by strengthening family ties and parental responsibility and facilitating the

transition to freedom. *Ibid.* The receipt of visits in prison, however, is a privilege and an aid to rehabilitation, not the accommodation of a pre-existing constitutional right. Prison officials must have authority to control visits, including authority to eliminate all visits for some prisoners, to deter criminal activity and maintain prison discipline and security.

I. A. The right the court of appeals recognized here—a right of inmates to receive social visits in prison—is fundamentally inconsistent with an inmate's status as a lawfully incarcerated prisoner. Incarceration as a means of punishment necessarily involves forfeiture of the liberties requisite for receiving visits, including the right to live in a particular location, to move freely in the community, to communicate privately, and to choose with whom one will associate. Moreover, there is no historical foundation for a right to receive visitors while in prison.

B. If prisoners do retain some modest right to receive visitors, it is limited to visits from close family members. Because Michigan's limits on visits by minors and former prisoners permit such visits, they do not impinge on any constitutional right.

II. Even if inmates have a limited constitutional right to in-person visits with those outside the institution, Michigan's restrictions on the exercise of that right are constitutional because they are justified by a legitimate penological interest. *Turner* v. *Safley*, 482 U.S. 78 (1987). Prison officials are entitled to make categorical judgments regarding who should be permitted to visit their institutions, and to apply those categories to contact and non-contact visits alike. Michigan's stated purpose of limiting the total number of people, and more specifically of limiting the number of children, who visit its institutions is a reasonable measure to ensure that visiting rooms and waiting rooms are properly supervised, to keep children safe from the many hazards inherent in the prison environment, and to prevent the flow of dangerous contraband (narcotics and weapons) into prison. Likewise, Michigan's purpose of deterring prisoners from using illegal substances while in prison helps ensure the safety of inmates

and officers and preserves order. Moreover, prisoners are permitted to associate with family members through letters and phone calls, so they have alternative means of exercising any residual associational rights.

III. Michigan's regulations do not violate the Eighth Amendment. Conditions of confinement are consistent with the Eighth Amendment unless they involve the deliberate imposition of pain or deliberate indifference to it. The Eighth Amendment requires prison officials to "provide humane conditions of confinement," "ensure that inmates receive adequate food, clothing, shelter, and medical care," and take "reasonable measures to guarantee the safety of the inmates." *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994). Michigan provides those basic necessities.

ARGUMENT

I. MICHIGAN'S RESTRICTIONS ON SOCIAL VISITS ARE NOT INCONSISTENT WITH THE FIRST AMENDMENT OR SUBSTANTIVE DUE PROCESS

Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner* v. *Safley*, 482 U.S. 78, 84 (1987); see *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979), "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974). "[I]mprisonment carries with it the * * * loss of many significant rights." *Hudson* v. *Palmer*, 468 U.S. 517, 524 (1984).

There can be no dispute that inmates retain many of the protections of the First Amendment, such as rights to free expression, *Thornburgh* v. *Abbott*, 490 U.S. 401, 407 (1989); to petition the government for the redress of grievances, *Johnson* v. *Avery*, 393 U.S. 483 (1969); and to free exercise of religion, *O'Lone*, 482 U.S. at 348. But a prisoner retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the

corrections system." *Pell*, 417 U.S. at 822; *Turner*, 482 U.S. at 95. See, *e.g.*, *Hudson*, 468 U.S. at 530 ("prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"). Even "[i]n the First Amendment context * * * some rights are simply inconsistent with the status of a prisoner." *Shaw* v. *Murphy*, 532 U.S. 223, 229 (2001).

In this case, the court of appeals held that prisoners retain a constitutional right to receive in-person social visits from unrelated individuals and minor nieces and nephews. That was error. First, the claimed right to in-person social visits with non-prisoners is inconsistent with the inmate's "status as a prisoner." The very essence of incarceration is separation from the outside world; prisoners do not have a First Amendment or Due Process right to in-person social association during lawful incarceration. Second, even if a limited right to prison visitation were recognized, Michigan's regulations would not transgress that right. Third, to the extent Michigan's regulations intrude on such a right, that intrusion is reasonably related to legitimate penological objectives.

A. Inmates Have No First Amendment Or Substantive Due Process Right To In-Person Social Visits

Outside the prison context, private citizens enjoy a right of intimate association. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-618 (1984) (describing a "right to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme"). The right has been variously described as a component of the First Amendment, see, *e.g.*, *Lyng* v. *Automobile Workers*, 485 U.S. 360, 365-366 (1988), and as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment, see *Jaycees*, 468 U.S. at 618 ("freedom of [intimate] association receives protection as a fundamental element of personal liberty"). Whatever its origins, the right protects only "certain kinds of highly personal

relationships"—"family relationships [that] involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Jaycees*, 468 U.S. at 618, 619-620. The Court thus has invoked that right in upholding the right of closely related relatives to live together, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion) (cohabitation of grandparents with grandchildren); the right of a family to dine together, *Lyng*, 485 U.S. at 365-366; and the right of parents "to establish a home and bring up children," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). See *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (recognizing that parents have a right to "make decisions concerning the care, custody, and control of their children"); *id.* at 77 (Souter, J., concurring) (similar).

1. Whatever the scope of that right outside prison walls, however, it does not survive conviction and incarceration. An inmate cannot challenge confinement itself as unconstitutional because it prevents him from living with or dining with close family members, or establishing a home and raising children, even though those rights are protected outside prison. The continued enjoyment of such in-person associational rights is flatly "inconsistent with" an inmate's "status as a prisoner." See *Pell*, 417 U.S. at 823 (inmate cannot challenge "refusal by corrections authorities to permit [him] temporarily to leave in order to communicate with persons outside"). The claimed right to in-prison social visits at issue here is equally inconsistent with prisoner status. As this Court has recognized: "The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 126 (1977). "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls." *Id.* at 125-126; see *id.* at 132. The assertion

of a right to gather with associates is fundamentally at odds with incarceration.[2]

This Court's analysis in *Turner* confirms that result. In *Turner*, the Court held that the right to marry is not inconsistent with incarceration, because "[m]any important attributes of marriage remain * * * after taking into account the limitations imposed by prison life." 482 U.S. at 95. Those attributes were the expression of emotional support and public commitment, the spiritual significance of the union, the possibility that the incarcerated spouse will be released and the marriage fully consummated, and the status of marriage as a precondition to the receipt of government benefits and other, less tangible benefits. See *id.* at 95-96. Here, in contrast, no meaningful attributes of the asserted right—a right to receive visitors at the place of incarceration—survive incarceration itself. The claimed right is in derogation of incarceration, which by design intrudes on the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972); see also *Kentucky Dep't of Corrs.* v. *Thompson*, 490 U.S. 454, 460 (1989) ("nor can it seriously be contended, in light of our prior cases[,] that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause"); *Mayo* v. *Lane*, 867 F.2d 374, 375 (7th Cir. 1989) ("Prison necessarily disrupts the normal pattern of familial association."); *McCray* v. *Sullivan*, 509 F.2d 1332, 1334 (5th Cir.) ("Visitation privileges are a matter subject to the discretion of prison officials."), cert. denied, 423 U.S. 859 (1975). Incarceration extinguishes the right to move about freely, to choose to live with family, and to dictate one's own schedule—all essential components of the right to visit with family outside of prison. It likewise terminates the right to in-person association with individuals of one's choosing.

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[2] Visits by attorneys and spiritual advisors are not implicated here, because none of the rules at issue appears to exclude attorneys or clergy. See Mich. Admin. Code R. 791.6607(2), R. 791.6609(8) and (11).

Prisoners, of course, may wish to maintain close emotional ties with their families despite incarceration. But Michigan is not constitutionally required to permit prisoners to maintain those ties through in-person visits, particularly given the availability of other mechanisms. As this Court explained in *Pell*, limits on visitation "cannot be considered in isolation but must be viewed in the light of the alternative means of communication * * * with persons outside the prison." 417 U.S. at 823. Thus, while there may be "particular qualities inherent in * * * face-to-face * * * discussion," one reasonable alternative in the prison context is "communication by mail." *Id.* at 823-824. Consequently, as in *Pell*, here "it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison." *Id.* at 824. Respondents, moreover, are permitted to communicate with those outside the prison by telephone, 9/19/00 Tr. 110, a means of communication not considered in *Pell*.

The court of appeals rejected those alternatives because many inmates are illiterate, and because phone calls are "monitored by department staff and" (according to that court) "terminated after a few minutes." Pet. App. 14a. But that reasoning cannot be reconciled with *Pell*. Illiterate inmates may still place phone calls and have others write on their behalf. For that reason, this Court rejected an identical argument in *Pell*: "[T]here is no suggestion that the corrections officials would not permit [illiterate] inmates to seek the aid of fellow inmates," of prison officials, or "of family and friends who visit them to commit their thoughts to writing." 417 U.S. at 828. "Merely because such inmates may need assistance to utilize one of the alternative channels [of communication] does not make it an ineffective alternative, unless, of course, the State prohibits the inmate from receiving such assistance." *Ibid.* The court of appeals gave no reason for ignoring *Pell*'s analysis here.[3]

[3] The BOP attempts to address illiteracy directly. See 18 U.S.C. 3624(f) (mandatory literacy program for inmates).

The court of appeals' conclusion that phone calls are an inadequate alternative, because calls may be monitored, is also unsound. The propriety of such monitoring is not at issue here; inmates have no reasonable expectation of privacy in verbal social communications made from or in prison;[4] and in-person social visits may be monitored as well. The court of appeals' privacy concerns are also difficult to reconcile with *Pell*, because illiterate inmates who must rely on others to put their thoughts into writing also sacrifice some privacy. Finally, the court of appeals' assertion that phone calls are "terminated after a few minutes," Pet. App. 14a, appears unfounded. The footnote cited by that court indicates only that, "depending on the security level," there are "usually time limits and halts to the phone call." *Id.* at 33a n.2. Inmates, in any event, have no right to *unlimited* phone privileges, any more than they have a right to unlimited time for any in-prison visits that are permitted or the use of other state-provided facilities.

The court of appeals also ignored that, as in *Pell*, the restriction on visits by minors and former prisoners at issue here "does not seal the inmate off from personal contact with those outside the prison." 417 U.S. at 824. Setting aside (for the moment) the withdrawal of visiting privileges for multiple drug offenses, Michigan permits prisoners to receive visits from all adult immediate relatives and others on their approved visitor lists, Mich. Admin. Code R. 791.6609(2) and (7)(a), as well as clergy and attorneys, *id.* R. 791.6607(2), R. 791.6609(8). Consequently, like the inmates in *Pell*, the prisoners in this case have a virtually "unrestricted opportunity to communicate" with those who cannot visit "through their

[4] *Lanza* v. *New York*, 370 U.S. 139, 143 (1962) (a prison shares "none of the attributes of privacy of a home, an automobile, an office, or a hotel room" because, "[i]n prison, official surveillance has traditionally been the order of the day"); *United States* v. *Harrelson*, 754 F.2d 1153, 1169-1170 (5th Cir.), cert. denied, 414 U.S. 908 (1985); *United States* v. *Friedman*, 300 F.3d 111, 123 (2d Cir. 2002); *United States* v. *Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989); *United States* v. *Van Poyck*, 77 F.3d 285, 290-291 (9th Cir.), cert. denied, 519 U.S. 912 (1996).

families, friends, clergy, or attorneys who are permitted to visit." 417 U.S. at 825. See *Smith* v. *Coughlin*, 748 F.2d 783, 788 (2d Cir. 1984) (regulations prohibiting visits with unrelated individuals constitutional in light of alternative means of communication).

2. The claim that prisoners retain a constitutional right to in-person visits, moreover, is inconsistent with history and the realities of modern prison administration. Early penitentiaries, which first developed in this country at the beginning of the 19th century, were intended to separate prisoners from the outside world. Prisoners in such institutions were generally not permitted social visitors. To the contrary, the institutions sought to "cut their inmates off from the free world, isolating them under circumstances in which they could be taught good habits, disciplined when necessary, and, it was hoped, reformed." N. Rafter & D. Stanley, *Prisons in America* 5 (1999). "Reformation would result (or so the thinking went) if the convicts were forbidden to talk with one another, [and] visited by no one but the occasional preacher." *Ibid.* The idea was to "remove the deviant from his (weak and defective) family, his evil community, and put him in 'an artificially created and therefore corruption-free environment.'" L. Friedman, *Crime and Punishment in American History* 77 (1993). See D. Rothman, *The Discovery of the Asylum* 94-96 (1971) (such institutions "attempted to isolate the prisoner both from the general community and from his fellow inmates"); *id.* at 71 (similar); R. McGowen, *The Well-Ordered Prison: England 1780-1865*, in *The Oxford History of the Prison* 80, 108 (N. Morris & D. Rothman eds. 1995) (reporting that, in English penitentiaries between 1780 and 1865, prisoners were permitted almost no visitors). Some penitentiaries restricted *all* forms of communication. See D. Rothman, *supra*, at 94-95; *e.g.*, G. de Beaumont & A. de Tocqueville, *On the Penitentiary System in the United States*, App. B, at 173 (reprint 1979) (1833) (Connecticut prison rule that "No convict shall write or receive a letter * * * nor have intercourse with persons without the prison, except by leave of the warden.").

In any event, those visits that were permitted often were granted as a matter of grace and limited to close family or charitable organizations. For example, church-sponsored "visiting societies" sometimes persuaded prison officials to allow their members to visit and aid prisoners. See http://www.warwick.ac.uk/fac/arts/History/teaching/courses/gender/lect5. In the 1790 Walnut Street Jail, "a prisoner [who] was diligent and good" might be permitted a "visit * * * from a close family member—but only once every three months, for fifteen minutes, through two grills, and under the scrutiny of the keeper." See H. Allen & C. Simonsen, *Corrections in America* 539 (9th ed. 2001).

Whether or not penologically sound, the early historical practice of entirely foreclosing or severely limiting in-prison social visits "provides 'contemporaneous and weighty evidence of the Constitution's meaning.'" *Alden* v. *Maine*, 527 U.S. 706, 743-744 (1999) (quoting *Printz* v. *United States*, 521 U.S. 898, 905 (1997)). Such practices, moreover, are entitled to great weight when determining the scope of substantive due process rights. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' * * * but also that it be an interest traditionally protected by our society."). In light of the drastic limits that the Nation's early penitentiaries commonly imposed not only on visits but on all communications with the outside world, Michigan's limited restrictions on in-person visits cannot be deemed constitutionally suspect. Cf. *Hewitt* v. *Helms*, 459 U.S. 460, 467 (1983) (prison may isolate inmates in "austere and restrictive administrative segregation quarters" without implicating liberty interests).

The reality of modern prison administration supports that conclusion (even setting aside the penological concerns discussed pp. 19-28, *infra*). In *Olim* v. *Wakinekona*, 461 U.S. 238 (1983), for example, this Court rejected the claim that a

prisoner has a fundamental liberty interest in being incarcerated within the State of conviction. "[I]t is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced," the Court explained, "or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State." 461 U.S. at 247; see *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976) (confinement in another State is "within the normal limits or range of custody which the conviction has authorized the State to impose"); *Montanye* v. *Haymes*, 427 U.S. 236 (1976) (same).

If an inmate has a right to receive visitors, then transferring him out-of-state at least severely burdens that right. *Olim*, however, rejected the claim that such a transfer—there, a transfer of over 2,000 miles from Hawaii to California—may be unconstitutional because of "the separation of the inmate from home and family." 461 U.S. at 248 n.9 (citing *Montanye*, 427 U.S. at 241 n.4); see *Thompson*, 490 U.S. at 461 (exclusion of a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence, and therefore is not independently protected by the Due Process Clause") (citation omitted). Just as the prisoner in *Olim* did not have a right to be housed in a location that allowed for in-person social visits as a practical matter, the prisoner-plaintiffs here have no right to demand that the State of Michigan open the prison doors and establish special facilities to facilitate visitation. To the contrary, a prisoner's physical separation from the outside world *is* his punishment, and the claimed right to breach that physical separation is inconsistent with prisoner status.

B. The Visitation Limits For Minors And Former Prisoners Do Not Impinge On Any Right Of Visitation The Constitution May Confer

Even if some residual right to in-person visits were to survive conviction and incarceration, Michigan's limits on visits by minors and former prisoners would not impinge on that right. Outside the prison context, the scope of the right to

in-person association that States may not unduly regulate is not well defined, and may properly be limited to the "[f]amily relationships [that] involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Jaycees*, 468 U.S. at 619-620; *id.* at 620 (relationships "distinguished by * * * relative smallness," a "high degree of selectivity," "and seclusion from others in critical aspects"). Inside prison, any residual interest a prisoner retains in that right is necessarily confined to members of the prisoner's immediate (*i.e.*, nuclear) family. See, *e.g.*, *Rules and Regulations for the Government and Discipline of the United States Penal and Correctional Institutions* 17 (¶ 50) (1936) (regular visits "will ordinarily be restricted to members of the prisoner's immediate family"); p. 15, *supra*.

The Sixth Circuit erred in extending that putative right to include visits from unrelated persons and more distant relatives. Contrary to the court of appeals' ruling (Pet. App. 12a-13a), Michigan officials did not transgress constitutional boundaries by permitting visits from the prisoner's minor children but not minor nieces and nephews. Mich. Admin. Code R. 791.6609(2)(b). Inside prison, any right to in-person social association cannot extend beyond the closest relationships, such as husband-wife or parent-child.[5] Likewise, that court erred in invalidating the prohibition (Mich. Admin. Code R. 791.6609(7)(a)) on visits by former prisoners other than immediate family. See Pet. App. 15a-16a; see also *id.* at 3a (enjoining petitioners "from denying visits by * * *

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[5] Although Michigan's prohibition originally excluded minor siblings, one month after the district court ruled, the Michigan legislature enacted a law providing that "a prisoner may be permitted to receive visits from a minor brother, sister, stepbrother, stepsister, half brother, or half sister if that minor is on the prisoner's approved visitor list." Mich. Comp. Laws Ann. § 791.268a (West Supp. 2002); Pet. App. 12a n.1; Pet. 8 n.5. In view of that change, if the Court were to identify or assume *arguendo* a residual constitutional right to receive visits from close family members, it need not reach whether any such constitutional right extends to minor siblings.

former prisoners"). Prisoners have no constitutional right to receive social visits from unrelated ex-convicts.

The court of appeals also erred in holding (Pet. App. 14a-15a) that prisoners have a constitutional right to in-prison visits with their minor biological offspring where the State has lawfully terminated parental rights. Whether or not consensual, such a termination of parental rights renders the prisoner, in contemplation of law, "forevermore, a stranger to her children." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 108 (1996). Prisoners therefore have no greater right to visit with such minors than they have to visit with the children of perfect strangers. See *Santosky* v. *Kramer*, 455 U.S. 745, 749 (1982) ("Termination denies the natural parents * * * the rights ever to visit, communicate with, or regain custody of the child."); Pet. App. 168a (on termination, "the children are treated as non-family members"). Prison officials may properly rely on the *legal* status of a minor's (or any other person's) relationship when determining whether to permit visits; they cannot be required to determine whether relationships that are not legally recognized should be deemed "close enough" to warrant special treatment.[6]

Finally, the court of appeals erred in invalidating Michigan's requirement that unemancipated minors be accompanied by an adult member of their immediate family or legal guardian. Pet. App. 16a-17a (invalidating Mich. Admin. Code R. 791.6609(5)). It is difficult to see how inmates have a constitutional right to in-prison visits with a minor *not* so accompanied. The State has a compelling interest, like society at large, in ensuring that children are not exposed to potentially undesirable circumstances absent close familial supervision. For example, the Motion Picture Industry Association's Classification and Rating Administration (CARA) provides that, for movies with an "R" rating, a child "[u]nder 17 requires [an] *accompanying parent or adult guardian.*" Surely Michigan may require a minor to be accompanied by an "immediate family member or legal guardian" when entering a prison to visit inmates, a location and activity far more fraught with potential danger and undesirable influences than an R-rated movie. See pp. 25-26, *infra*.

[6] There is, in any event, no claim that any prisoner in this case retained a legal interest in biological children following termination, such as by conditioning the consent to termination. And, if the Constitution protects some aspect of a parent-child relationship after the State terminates it, that would not necessarily encompass a right to receive in-prison visits; it certainly would not extend to every termination based on consent; and prison officials could justifiably require proof that a legally cognizable relationship exists. The district court's injunction against "denying visits by * * * biological children of prisoners whose parents voluntarily terminated their parental rights (other than for abuse or neglect)," Pet. App. 3a, is thus fatally overbroad.

In some instances, it may be difficult for parents to accompany children themselves, other immediate family members may be unavailable, and legal guardianship a cumbersome alternative. See, *e.g.*, Pet. App. 16a. But prison officials are not required to make visits as convenient as possible. Parents who wish to expose their minor children to the prison environment bear some responsibility for accompanying them, finding immediate family members to accompany them, or establishing legal guardianship to that end. Failing that, such hardships may be addressed through the authority of wardens to make exceptions in the prisoner's best interests on a visit-by-visit basis. Mich. Admin. Code R. 791.6609(3). While the court of appeals suggested that *some* wardens "appear to refuse to grant waivers," Pet. App. 16a, that concern should be addressed in an individual case where such a waiver is denied, and cannot justify the across-the-board injunction issued here.

II. MICHIGAN'S REGULATIONS ARE REASONABLY RELATED TO LEGITIMATE PENOLOGICAL INTERESTS

If prisoners do retain some constitutional right to receive visits, that right must be qualified by the fact of incarceration. The punishment of incarceration carries with it the forfeiture of many privileges, including the freedom to host visitors at will. See *Pell*, 417 U.S. at 822 (incarceration en-

tails "confining criminal offenders in a facility where they are isolated from the rest of society"). At most, a prisoner would retain an extremely qualified right to have a small number of visits from immediate family members, limited by the schedule and other requirements of the prison system. Because separation from the community is part of the punishment, limits on the time, place, and manner of social visits should not implicate the Constitution so long as they have a rational basis. Moreover, a prisoner has no right to choose his prison, and therefore no right to be placed in a facility close to his chosen visitors. See *Olim*, 461 U.S. at 247.

Under this Court's *Turner* decision, a prison rule that impinges on a constitutional right must be upheld if "it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. "[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." *Shaw*, 532 U.S. at 229 (citations omitted). Three other factors are also relevant: (1) alternative means of exercising the right; (2) the impact accommodation of the right will have on guards, inmates, and the allocation of prison resources; and (3) the absence of ready alternatives for achieving the governmental objectives. *Id.* at 229-230. Because "courts are ill equipped to deal with the complex and intractable problems of prisons," they must "defer[] to prison officials' judgment" when applying the *Turner* test. *Shaw*, 532 U.S. at 223. Prison officials, not the courts, "are to remain the primary arbiters of the problems that arise in prison management." *Id.* at 224.

That deference is warranted here. Although "many categories of noninmates seek access to" prisons, including "families and friends of prisoners who seek to sustain relationships with them," *Thornburgh* v. *Abbott*, 490 U.S. at 407, "prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison." *Ibid.* Because of "the expertise of these officials" and because "the judiciary is ill equipped to deal with

the difficult and delicate problems of prison management," prison officials are entitled to "considerable deference" in regulating in-person contact between prisoners and the outside world. *Id.* at 407-408 (citations and internal quotation marks omitted); see *Peterson* v. *Shanks*, 149 F.3d 1140, 1145 (10th Cir. 1998) ("prison officials necessarily enjoy broad discretion in controlling visitor access to a prisoner").

Deference is particularly warranted given the implications for discipline and security and the close relationship between visiting privileges and broader penological objectives. "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell*, 441 U.S. at 546. Prison officials are properly concerned with deterring prisoners from participating in criminal activity while incarcerated. *Pell*, 417 U.S. at 822-823. For example, the United States (through the BOP, the INS, and the Department of Defense) detains individuals with established or suspected ties to terrorism. Permitting such inmates and detainees to receive even seemingly innocuous visitors may present a security risk. In all prisons, moreover, visits are a particular concern, because they are the principal means by which inmates obtain weapons and drugs. Consequently, "even where claims are made under the First Amendment," this Court has repeatedly refused "'to substitute [its] judgment on . . . difficult and sensitive matters of institutional administration,' * * * for the determinations of those charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353. Moreover, the very fact that the BOP generally encourages visits with family members as serving rehabilitative goals, but sometimes restricts visits to serve disciplinary or safety concerns, demonstrates how closely bound up decisions about the scope of visitation privileges are with questions of penological philosophy. Those are matters on which prison authorities are entitled to particular deference.

A. Withdrawing Visiting Privileges For Two Major Drug Infractions In Prison Serves A Valid Penological Interest

The court of appeals did not dispute that Michigan has a compelling interest in deterring the possession, use, and distribution of controlled substances and other contraband in prison. This Court repeatedly has recognized the "serious security dangers" presented by "drugs, weapons, and other contraband." *Bell*, 441 U.S. at 559; *Block* v. *Rutherford*, 468 U.S. 576, 586-587 (1984); see *Rickman* v. *Avaniti*, 854 F.2d 327 (9th Cir. 1988) ("[W]eapons, drugs, and other * * * contraband are serious problems in our nation's prisons."). The court of appeals, however, held that the ban on visits for prisoners found guilty of two, in-prison, major substance abuse infractions is unconstitutional under *Turner* because prison officials had "produced only anecdotal evidence to show that the permanent ban on visitors has deterred drug abuse in the prison population." Pet. App. 20a. That misconstrues Michigan's burden. Michigan need not produce scientific proof; common sense is sufficient. Because of Michigan's rule, inmates who wish to preserve visiting privileges, perhaps among the most valued privileges in prison life, will think twice about violating the prison's substance abuse rules, particularly if they have violated those rules before. Experienced correction officials, moreover, testified to the rule's efficacy. See, *e.g.*, 9/18/00 Tr. 73-74, 94, 151. And numerous correctional institutions, including those operated by the BOP and the States, deny visiting privileges as discipline for serious infractions based on the same conclusion. See pp. 1, 3, *supra* (BOP policy); Amicus Br. of the States of Colorado, *et al.*, in Supp. of the Pet. 1 n.1.

The court likewise erred in rejecting the ban under the other *Turner* factors. Contrary to the court of appeals, prisoners do not lack other "alternatives for keeping ties with family and friends outside prison" when visiting privileges are withdrawn for disciplinary reasons. Pet. App. 20a. Inmates denied visiting privileges because of repeated disciplinary violations can still stay in touch with loved ones through phone calls and letters. See pp. 12-13, *supra*. Likewise, the court erred in asserting that "prison officials have at their disposal many other constitutional means of punishing prisoners." Pet. App. 20a. The withdrawal of visiting privileges at issue here is imposed only for inmates who are found guilty of a *second* serious in-prison drug infraction; as to those inmates, the first-line punishment has already shown itself to be an insufficient deterrent. Further, for high-security prisoners, administratively segregated prisoners, and others who have few privileges in the first instance, withdrawing visiting privileges may be the only effective form of discipline, as the evidence showed. 9/18/00 Tr. 91-92, 95, 107; see *id.* at 96 (prisoners "with little" else "to lose"). In any event, prison officials need not demonstrate that they have chosen the least restrictive alternative. See *Abbott*, 490 U.S. at 419. Although prison officials might deter some drug use by revoking other privileges, they can reasonably conclude that revoking visits is a more effective deterrent.

Notwithstanding the court of appeals' one-paragraph analysis under *Turner*, Pet. App. 20a, the court's primary concern appears not to have been the substance of the rule but its allegedly arbitrary application, *id.* at 17a-20a. It is not entirely clear that such arbitrariness has been proved.[7] More

[7] Michigan's rules permit inmates to challenge, in a formal hearing, any serious misconduct charge that can be a predicate for withdrawing visiting privileges. See Mich. Admin. Code R. 791.3315; p. 4, *supra*; Pet. App. 22a ("Michigan inmates are given a hearing before being found guilty of a specific drug offense"). Thus, while the court of appeals expressed concern that Michigan might have on occasion treated a single violation as two separate infractions (Pet. App. 19a-20a), it nowhere suggested that the affected inmate could not have invoked the hearing process to challenge the second violation as subsumed by the first. Moreover, any double-counting would pose problems no matter what the punishment, and should be addressed through procedures, not by revising the punishment. The evidence at trial also suggested that prisoners can challenge an erroneous imposition of the ban (or failure to lift it) through informal grievances. 10/15/00 Tr. 57-59, 70. In any event, there was evidence prison officials used reasonable criteria, 9/19/00 Tr. 110, 140 (consideration

important, a finding of arbitrary application would not support the court of appeal's conclusion that the underlying *rule* lacks a legitimate penological justification. Instead, as the court of appeals itself appears to have recognized (Pet. App. 22a), any claim of arbitrariness is properly analyzed as a matter of *procedural* due process under the test this Court established in *Sandin* v. *Conner*, 515 U.S. 472 (1995). Under that test, some process is due if the change in the condition of confinement amounts to a "grievous loss" and "an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 480, 484. Even if that standard were satisfied, the remedy would be an injunction that prevents imposition of the sanction absent procedural protections, not an injunction against application of the rule in any circumstance.[8]

B. The Limits On Visits By Minors And Former Prisoners Serve Legitimate Penological Interests

Michigan's limits on who may visit are likewise supported by legitimate penological interests. Contrary to the court of appeals' conclusion, the goal of limiting the total number of visitors, and child visitors in particular, is entirely reasonable. Because prison visits are a known means of passing contraband and communicating about criminal activity, *Block*, 468 U.S. at 586; *Bell*, 441 U.S. at 559, limiting the number of visitors to permit adequate supervision is imperative. *Pell*, 417 U.S. at 827 (security concerns are "sufficiently paramount * * * to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates"); *Bell*, 441 U.S. at 560 n.40 (close monitoring of interactions one way to reduce contraband).

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of other serious misconduct when deciding whether to lift the ban), and there is reason to think other findings of arbitrariness suspect, Pet. Br. 17-18 & n.8.

[8] There is no separate question presented addressing the court of appeals' application of *Sandin*. The court of appeals' *Sandin* analysis, Pet. App. 22a, however, appears merged and intertwined with its erroneous cruel and unusual punishment analysis, *id.* at 20a-22a. See pp. 28-30, *infra*.

Even if prison officials did not finely calibrate the proposed restrictions to achieve a particular number of visitors, there is no requirement that visiting regulations accommodate the maximum number of visitors possible or employ narrowly tailored means. To the contrary, any increase in visitors places additional strain on prison staff, who must monitor visiting rooms and visiting waiting rooms, and must conduct security screenings of visitors entering and leaving the prison. Pet. App. 136a-137a. In the BOP's experience, proper monitoring and processing of even a moderate number of visits requires numerous officers. The court of appeals erred in disregarding the testimony of corrections officials that the new policy had kept visits (and child visits) to a more manageable level and reduced the introduction of contraband. See 9/18/00 Tr. 87, 90, 125; 9/19/00 Tr. 31-32; Pet. App. 39a, 51a-52a, 155a.

For similar reasons, the court of appeals erred in rejecting Michigan's legitimate concerns about the safety and welfare of children. Because children can be energetic and unpredictable, they present a special burden for prison staff charged with monitoring, maintaining order, and ensuring visitor safety. Petitioners presented evidence not only that disruptive child behavior can distract the correctional officers assigned to supervise visitation, Pet. App. 133a-134a, 136a; 9/18/00 Tr. 22, 89-90, but also that inmates may rely on those disruptions to facilitate the introduction of contraband, 9/18/00 Tr. 90. Exposure to prisoners, moreover, "necessarily carries with it risks that the safety of innocent individuals" like children "will be jeopardized in various ways. They may, for example, be taken as hostages or become innocent pawns in escape attempts." *Block*, 468 U.S. at 586-587.

Finally, notwithstanding the diligent efforts of staff to regulate inmate behavior, prison visits carry the risk that children will be exposed to inappropriate sexual or violent conduct. See 9/18/00 Tr. 9, 23-24, 52, 54, 74 (prisoners masturbating and exposing themselves to and in view of children); Pet. App. 58a-59a (noting testimony concerning "sexual misconducts occurring in non-contact situations"); *id.* at

132a (testimony that children "observed and viewed" conduct such as "sexual behavior," "people assault[ing] people, lot[s] of groping and other inappropriate behavior"); *ibid.* (visitor complaint about "triple X stuff in the visiting room"). Indeed, Michigan's revision to its policies was prompted in part by an inmate's sexual assault on an unrelated three-year-old child during a prison visit. Pet. App. 132a-133a; Pet. Br. 4. The BOP advises us that visiting minors in its facilities have, at times, been assaulted, witnessed assaults on visitors, been exposed to sexual conduct, heard outpourings of profanity, and been in close proximity to violent altercations between misbehaving prisoners and the corrections officials who attempt to restrain them. See also *Barry* v. *Whalen*, 796 F. Supp. 885 (E.D. Va. 1992) (oral sex and other sexual acts in view of other visitors).

Michigan's limits on minor visitors are a reasonable response to such concerns. Restricting visits by minors to those most closely related to the prisoner, such as the prisoner's offspring, Mich. Admin. Code R. 791.6609(2)(b), make it possible for prison staff to keep a more watchful eye on those children who are present, check unruly behavior, and keep the children clear of hazards and threats to their health and safety. See Pet. App. 136a; p. 25, *supra*. The requirement that minors be accompanied by an adult member of their immediate family or legal guardian, Mich. Admin. Code R. 791.6609(5), helps ensure that the child is supervised by a family member or other person who is uniquely responsible for the child's welfare, who is used to making decisions on the child's behalf, and to whom the child is likely to be responsive. See Pet. App. 155a; 9/18/00 Tr. 36-37. Given the peculiar nature of the prison environment and the unique threats it presents, such precautions are not unreasonable.

The court of appeals rejected those justifications in part because, in its view, decisions regarding how best to protect children from inappropriate environments are "for parents to make." Pet App. 13a. Even outside prisons, however, the State has a strong interest in protecting the welfare of children. See, *e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158, 168

(1944). In any event, the State is under no obligation to make *its facilities* available to children under conditions that, in the State's view, may expose children to an unhealthy environment and inappropriate dangers.

Nor are "non-contact" visits an answer. Non-contact visits may reduce (but not eliminate) the likelihood of children being physically assaulted or being used in smuggling. But children still can be exposed to inappropriate conduct—by the inmate they are visiting, by other inmates, or by others in the visiting area—during non-contact visits. See pp. 25-26, *supra*; Pet. App. 30a. Similarly, non-contact visits do not address the need for close supervision and control of children as they enter and leave the physically dangerous prison environment; the need for such supervision and control in waiting rooms and visiting rooms to ensure order and safety; the fact that disruptive behavior by children distracts corrections officials; or the risk that children might become hostages.

Further, contrary to the court of appeals' assumption, non-contact visits are not always an administrable alternative to contact visits. In the federal system, most institutions do not have facilities for non-contact visits; such facilities are generally available only in pre-trial detention centers and high security institutions. The court of appeals' recognition of a right to non-contact visits as an alternative to contact visits thus could require physical modification and reconstruction of numerous federal correctional facilities. That burden weighs heavily against finding a constitutional violation under the *Turner* balance. In light of the availability of other means of communication, such as letters, telephone calls, and communication through others, see pp. 12-14, *supra*, prison officials are under no obligation to reconstruct prison facilities to provide for non-contact visits as an alternative to contact visits that prove too dangerous.

Finally, and for similar reasons, the prohibition on visits by former prisoners who are not immediate family, lawyers or clergy, Mich. Admin. Code R. 791.6609(7), (8), is lawful. Like the prison officials in *Pell*, Michigan prison officials have authority to "limit[] visitations" to those categories of

persons who, in "the judgment of state corrections officials," will "aid in [the prisoners'] rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security." 417 U.S. at 827. "Such considerations are peculiarly within the province and professional expertise of corrections officials." *Ibid.* Michigan's judgment that former prisoners (other than family members) are not likely to aid in rehabilitation is sensible. Indeed, visits from former prisoners can convert current inmates into conduits for information between prisoners about criminal activity inside and outside of prison. The court of appeals erred in substituting its own view of wise penological policy for the judgment reached by the Michigan officials "charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353.

Moreover, the need for deference to prison officials is particularly great precisely because restrictions on visitation are bound up with judgments about penological philosophy. While incarceration does not place a wall between the prisoner and the Constitution, it does place a wall between the prisoner and those associates with whom he could otherwise freely associate. That fact not only suggests the absence of a constitutional right, but the need for deference to prison officials. Decisions about the scope of visitation privileges are bound up with critical questions about how prison officials will run an institution and balance the goals of rehabilitation and discipline. Indeed, the BOP has determined that the extension of visiting privileges serves rehabilitative goals in most circumstances, while the withdrawal of those privileges in some cases is the better course. Other institutions may reach slightly different judgments because they accommodate competing goals differently. In each case, courts should give substantial deference to such fundamental judgments about penological philosophy.

III. MICHIGAN'S REGULATIONS DO NOT VIOLATE THE EIGHTH AMENDMENT

In *Wilson* v. *Seiter*, 501 U.S. 294, 297 (1991), this Court held that, to establish that "deprivations that [are] not specifically part of the sentence but [are] suffered during imprisonment" violate the Eighth Amendment, a prisoner must show that the conditions of confinement involve the deliberate imposition of pain or deliberate indifference to it. "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) (internal quotation marks and citations omitted).

The Eighth Amendment requires prison officials to "provide humane conditions of confinement," to "ensure that inmates receive adequate food, clothing, shelter, and medical care," and to take "reasonable measures to guarantee the safety of the inmates." *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994). Only "extreme deprivations" support an Eighth Amendment claim because "routine discomfort" is part of the penalty inmates pay for their crimes. *Hudson* v. *McMillian*, 503 U.S. 1, 8-9 (1992).

Michigan's visiting regulations do not impose such an extreme deprivation. They do not deny prisoners food, clothing, shelter, or medical care, or subject them to wanton pain or a threat of physical harm. In the absence of such conditions, even measures that may seem harsh do not offend the Eighth Amendment. See *Rhodes* v. *Chapman*, 452 U.S. 337, 346-347 (1981); see also *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) (only "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment). Nor are Michigan's rules inconsistent with historical practice or evolving standards of decency. To the contrary, early in this Nation's history, in-person contact between inmates and outsiders was often foreclosed, see pp. 2, 14-15, *supra*, and there is no clear consensus that withdrawing visiting privileges is inappropriate punishment for repeated and serious misconduct, see p. 22, *supra*.

The court of appeals ignored those standards in concluding that the ban on visits violates the Eighth Amendment. The isolation inherent in denying visits is not itself constitutionally objectionable. *Hutto* v. *Finney*, 437 U.S. 678, 685 (1978) (rejecting claim that "indeterminate sen-

tences to punitive isolation always constitute cruel and unusual punishment"); *In re Long Term Admin. Segregation*, 174 F.3d 464, 472 (4th Cir.) (isolation associated with administrative segregation or maximum custody does not deprive prisoners of any basic human need), cert. denied, 528 U.S. 874 (1999); cf. *Hewitt*, 459 U.S. at 466-467 ("austere and restrictive administrative segregation quarters" do not violate the Fourteenth Amendment). Even if "depression, hopelessness, frustration, and other such psychological states may well prove to be inevitable byproducts" of isolation in prison, those conditions are a fact of incarceration and do not violate the Eighth Amendment. *Jackson* v. *Meachum*, 699 F.2d 578, 584 (1st Cir. 1983) (collecting cases).

Once again, the Sixth Circuit's concern seems to have been not so much the substance of Michigan's rule but the court's perception that the rule was applied arbitrarily. See Pet. App. 21a-22a. Once again, however, such concerns are better addressed under the rubric of procedural due process, and cannot justify an injunction against the rule's nonarbitrary application. See pp. 23-24, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Michigan Administrative Code R. 791.3315 provides in relevant part:

R 791.3315 Formal hearing; notice; evidence; staff investigator; decisions; posting.

Rule 315. (1) Not less than 24 hours before a formal hearing, a prisoner shall receive written notice of the hearing. The notice shall include all of the following:

(a) Any charges of alleged violations.

(b) A description of the circumstances giving rise to the hearing.

(c) Notice of the date of hearing.

(2) A prisoner shall set forth all of the following on the notice form:

(a) Necessary witnesses the prisoner wishes to have interviewed, if any.

(b) A request for documents specifically relevant to the issue before the hearing officer, if any.

(c) A request for assistance of a staff investigator to gather evidence or speak for the prisoner, if desired.

(3) A prisoner may waive the 24-hour notice requirement if that waiver is in writing and signed by the prisoner.

(4) If the prisoner fails to appear for a hearing after proper notice has been given as set forth in subrule (1) of this rule, the hearing officer may proceed with the hearing and make a decision in the absence of the prisoner.

(5) A prisoner has all of the following rights at a formal hearing:

(a) To be present and offer evidence, including relevant documents and oral and written arguments, on his or her own behalf.

(b) To compel disclosure of documents specifically relevant to the issue before the hearing officer, unless disclosure presents a threat to personal or institutional safety.

(c) To present evidence from necessary, relevant, and material witnesses, when to do so is not unduly hazardous to institutional or safety goals.

(d) To have presented to the hearing officer the report of a staff investigator who interviewed and obtained statements from relevant witnesses, secured relevant documents, and gathered other evidence, if a staff investigator was requested when notice of the charges was given, unless that request is denied as set forth in subrule (6) of this rule, and if the prisoner has reasonably cooperated with the staff investigator.

(e) To submit written questions to the hearing investigator to be asked of witnesses.

(f) To request disqualification of a hearing officer for personal bias, upon presenting to the hearing officer at the hearing an affidavit containing specific evidence of personal bias. The hearing officer shall make a specific ruling on this request in the hearing report. If personal bias is found, the hearing shall be immediately adjourned and assigned to a different hearing officer.

(6) If the hearing officer denies a request made by a prisoner on the notice form provided under subrule (2) of this rule, specific reasons for the denial shall be placed in the record. The presence of a witness is not necessary if the

witness's testimony is repetitious or if the witness is able to provide the hearing officer or investigator with a complete written statement.

(7) A staff investigator shall be available, when necessary, to gather and present factual evidence orally or in writing at the request of either the prisoner or the hearing officer. If the hearing officer determines that a prisoner appears to be incapable of speaking effectively for himself or herself, the hearing officer shall request a staff investigator to appear and present arguments on the prisoner's behalf. The failure of a staff investigator to present requested documents or statements is justified if to do so would be unduly hazardous to institution or safety goals or if the information is irrelevant or unnecessary to the particular case. The specific reason for such failure shall be placed in the record.

(8) The hearing officer shall render a written decision or recommendation in every case. The written decision or recommendation shall include all of the following:

(a) The reasons for the denial of a prisoner's requests, if any.

(b) A statement of the facts found.

(c) The evidence relied on in support of the decision or recommendation.

(d) Any sanctions or orders imposed by the hearing officer. A copy of the decision shall be furnished to the prisoner.

(9) Within 48 hours of the conclusion of a hearing on a charge of major misconduct, a facility shall post all of the following information:

(a) The name and prison number of the prisoner charged.

(b) The violations charged.

(c) Whether the prisoner was found guilty or not guilty of each violation or whether it was dismissed. This information shall be posted in an area which is accessible to staff, but is not usually accessible to prisoners, and shall remain posted for not less than 72 hours.

2. Michigan Administrative Code R. 791.5501 provides in relevant part:

R 791.5501 Major misconduct; minor misconduct; hearing; confiscation and disposition of contraband.

Rule 501. (1) An alleged violation of department rules shall be classified as major misconduct or minor misconduct on the basis of the seriousness of the act and the disciplinary sanctions allowed. The director shall determine what constitutes major and minor misconduct, the time limits for conducting hearings, and the range of disciplinary sanctions which may be imposed upon a finding of guilt.

(2) A prisoner charged with major misconduct shall be provided a formal hearing conducted in accordance with R 791.3315. A prisoner charged with minor misconduct shall be provided a fact-finding hearing conducted in accordance with R 791.3310. Upon a finding of guilt of major or minor misconduct, the prisoner shall be subject to the disciplinary sanctions ordered by the hearing officer.

(3) A prisoner may plead guilty to a minor misconduct and waive a hearing by signing a written waiver. If the

waiver is accepted, disciplinary sanctions may be imposed by the department official accepting the waiver.

(4) In addition to the disciplinary sanctions imposed by the hearing officer, a prisoner who is found guilty of a major misconduct shall be subject to both of the following provisions:

(a) A prisoner who is subject to good time or disciplinary credits will not earn good time or disciplinary credits during the month in which the major misconduct violation occurred. The warden also may forfeit previously earned good time and disciplinary credits pursuant to R 791.5513, and not grant special good time and special disciplinary credits.

(b) A prisoner who is subject to disciplinary time will accumulate disciplinary time for the major misconduct pursuant to R 791.5515.

(5) Property determined to be contraband at a misconduct hearing or based on a waiver accepted pursuant to this rule shall be confiscated and disposed of in accordance with department policy as directed by the hearing officer or department official who accepted the waiver.

3. Michigan Administrative Code R. 791.6607 provides in relevant part:

R 791.6607 Visitation; visiting hours; quotas; religious, legal, and official visits.

Rule 607. (1) The department shall establish reasonable visiting hours and uniform quotas at each institution for visits to prisoners to promote order and security in the institutions and to prevent interference with institutional routine or disruption of the prisoner's programming. A visit described in subrule (2) of this rule shall not be counted toward a prisoner's visiting quota.

(2) Except when the person is related to the prisoner by blood or marriage, a prisoner shall be allowed to visit with any of the following persons, who shall not be required to be on the prisoner's approved visitor list:

(a) Qualified members of the clergy of the prisoner's designated religion or clergy that the prisoner specifically requests to see.

(b) Volunteers in an outreach program that is sponsored by an external religious organization if the volunteers meet the requirements issued by the director for approved volunteers.

(c) Attorneys on official business or a legal paraprofessional or law clerk who is acting as an aide to counsel for the prisoner.

(d) An official representative of the legislative, judicial, or executive branch of government.

4. Michigan Administrative Code R. 791.6609 provides in relevant part:

R 791.6609 Limits on visitation.

Rule 609. (1) Except as otherwise provided in this rule, any person who is not subject to a current visitor restriction pursuant to the provisions of R 791.6611 may visit a prisoner if all of the following provisions are complied with:

(a) The person presents valid and adequate proof of identification.

(b) The person is on the prisoner's list of approved visitors, as provided in subrule (2) of this rule.

(c) The visit is within the allowable quota established by the department.

(d) The visit does not constitute a threat to the prisoner's physical or mental well-being.

(e) The visit does not constitute a threat to public safety or to the order and security of the institution.

(f) Allowing the visit is not harmful to the prisoner's rehabilitation.

(g) The purpose of the visit is not to commit an illegal act.

(2) Except as provided in R 791.6607(2) and subrule (3) of this rule, a person may visit a prisoner only if he or she is on the list of approved visitors for that prisoner, which shall consist of the prisoner's immediate family members and not more than 10 other persons. The approved visitors list shall be subject to all of the following restrictions:

(a) A person may be on the approved visitors list of any prisoner to whom she or he is related as an immediate family member, but shall be on the list of only 1 prisoner at a time to whom she or he is not related as an immediate family member.

(b) A person on an approved visitor list shall be not less than 18 years of age, unless he or she is the child, stepchild, or grandchild of the prisoner or an emancipated minor who can show proof of emancipation.

(c) If the person is claimed to be an immediate family member, the prisoner shall present adequate proof of the relationship, as determined by the warden or his or her designee.

(d) A prisoner may add or delete names of immediate family members from his or her approved visitors list at any time, but shall be allowed to add or delete other names only once every 6 months.

(e) A person shall be removed from a prisoner's approved visitors list upon written request by the listed person.

(f) A warden may deny placement of anyone on a prisoner's approved visitors list for reasons of safety or security of the institution, protection of the public, previous violations of visiting room rules by the person, or for other cause as determined by the warden. A denial of placement on the list may be appealed through the prisoner grievance process.

(3) The warden may allow a single visit between a prisoner and a person who is not on the approved visitors list of the prisoner if the warden determines the visit is in the best interest of the prisoner and is not a threat to the good order and security of the facility.

(4) Each institution shall prescribe and display reasonable rules of conduct for visits to preserve public safety and institutional security and order and to prevent conduct that may be offensive to others who may be present. If a prisoner or visitor violates the provisions of this subrule, then the visit may be terminated and the prisoner and visitor may be subject to sanctions up to and including a permanent restriction of all visits or restriction to noncontact visiting only.

(5) Subject to the restrictions in subrule (6) of this rule, a child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian, unless the individual is an emancipated minor.

(6) A child who is under the age of 18 shall not be permitted to visit if any of the following provisions apply:

(a) The parental rights of the prisoner to the child have been terminated.

(b) There is a court order prohibiting visits between the child and the prisoner.

(c) The prisoner has been convicted of child abuse, criminal sexual conduct, or any other assaultive or violent behavior against the child or a sibling of the child, unless specific approval for the visit has been granted by the director.

(7) Except as provided in subrule (8) of this rule, a prisoner, a former prisoner, a probationer, or a parolee shall not be allowed to visit with a prisoner unless the person is on the prisoner's approved visitors list and all of the following criteria are met:

(a) The person is an immediate family member of the prisoner.

(b) Prior approval for the visit is obtained from the warden of the institution where the visit will occur.

(c) In the case of a probationer or parolee, prior approval for the visit is obtained from the warden of the institution and the supervising field agent.

(8) A former prisoner shall be allowed to visit if she or he is one of the individuals identified in R 791.6607(2).

(9) For purposes of this rule, "immediate family member" means any of the following persons:

(a) Grandparent.

(b) Parent.

(c) Stepparent.

(d) Spouse.

(e) Mother-in-law or father-in-law.

(f) Child.

(g) Stepchild.

(h) Grandchild.

(i) Sibling.

(j) Stepbrother or stepsister.

(k) Aunts and uncles if verification is provided that they served as surrogate parents.

(10) A prisoner who is hospitalized may receive visitors only if he or she is critically ill, as verified by the attending physician, and prior approval is granted by the warden or deputy warden.

(11) The director may permanently restrict all visitation privileges, except with an attorney or member of the clergy, for a prisoner who is convicted or found guilty of any of the following:

(a) A felony or misdemeanor that occurs during a visit.

(b) A major misconduct violation, as defined in R 791.5501, that occurs during a visit or is associated with a visit.

(c) An escape, attempted escape, or conspiracy to escape.

(d) Two or more violations of the major misconduct charge of substance abuse.

(12) The director may grant reconsideration and removal of a permanent visitor restriction of all visitation privileges that is imposed pursuant to subrule (11) of this rule.

(13) Nothing in this rule creates an enforceable right of the prisoner to receive a visit or of a visitor to visit a prisoner.